

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

(San Francisco, California)

FAMILY SERVICE AGENCY SAN FRANCISCO 1/

Employer

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 790, AFL-CIO

Union

and

HELEN SINGH, An Individual

Petitioner

20-RD-2349

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, 2/ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 1/
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 3/
3. The labor organization(s) involved claim(s) to represent certain employees of the Employer. 4/
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. 5/
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 6/

All full-time and regular part-time non-professional and professional employees employed by the Employer in its Teenage Pregnancy and Parenting Project located at 2730 Bryant Street, San Francisco, California, excluding all confidential employees, managerial employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election

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date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 790, AFL-CIO.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB. Wyman-Gordan Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. **North Macon Health Care Facility**, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before February 11, 2003. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by February 18, 2003.

Dated February 4, 2003

at San Francisco, California

/s/ Robert H. Miller
Regional Director, Region 20

- 1/ The Employer's name is in accord with the stipulation of the parties.
- 2/ Administrative notice is taken of the following documents which are entered into evidence as Board Exhibit 7 (the Charge in Case 20-CA-30725-1 filed on June 17, 2002) and Board Exhibit 8 (the letter dismissing the charge in Case 20-CA-30725-1 dated June 31, 2002).
- 3/ The parties stipulated, and I find, that the Employer, a non-profit California corporation with an office and place of business in San Francisco, California, provides various social services to the community in San Francisco. During the calendar year ending December 31, 2001, the Employer derived gross revenues in excess of \$500,000, and received goods valued in excess of \$5,000, which originated from points outside the State of California. Based on the parties' stipulation to such facts, I find that the Employer is engaged in commerce and that it will effectuate the purposes and policies of the Act to assert jurisdiction in this case.
- 4/ The parties stipulated, and I find, that the Union is a labor organization within the meaning of the Act.
- 5/ The Petitioner seeks a decertification election in the following unit:

All full-time and regular part-time non-professional employees, employed by the Employer in its Teenage Pregnancy and Parenting Project located at 2730 Bryant Street, San Francisco, California; excluding, all confidential employees, managerial employees, guards and supervisors as defined in the Act.

The Union contends that the petition must be dismissed for several reasons, including that the Region should determine the showing of interest because of the substantial hiatus between the filing of the petition and any election ordered; because of changed circumstances resulting from the merger of the TAPP program into a single contractual unit with another certified unit of the Employer at its Family Development Center in San Francisco; because there is a contract bar to this proceeding; and because the unit in the petitioned-for unit is no longer a valid unit since the parties have negotiated a collective-bargaining agreement covering what were two separate units. The Union also contends that a decertification election should not be conducted at this time in only part of the contractual unit because the conduct of such an election would de-stabilize an existing collective-bargaining relationship. The Employer takes the opposite position on each of these issues.

On October 17, 1997, the Union was certified in Case 20-RC-17201 as the exclusive collective-bargaining representative of the Employer's employees in the following unit:

All full-time and regular part-time employees including Assistant Teachers, Teachers Aides and Supervising Teachers employed by the Employer at its Family Development Center located at 2730 Bryant Street, San Francisco, California; excluding the Child Development Specialist, the Teenage Pregnancy Prevention Program, guards and supervisors as defined in the Act.

Thereafter, on October 26, 2000, the Union was certified in Case 20-RC-17214, as the exclusive collective bargaining representative in the Employer's employees in the following unit, herein called the TAPP Unit:

All full-time and regular part-time non-professional and professional employees employed by the Employer in its Teenage Pregnancy and Parenting Project located at 2730 Bryant Street, San Francisco, California; excluding all confidential employees, managerial employees, guards and supervisors as defined in the Act.

The decertification petition in the instant proceeding was filed on June 17, 2002. Administrative notice is taken of the charge in Case 20-CA-30725-1 filed by the Union on June 17, 2002, alleging that the Employer had violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union as the exclusive bargaining representative of the TAPP Unit. This charge was dismissed by letter dated July 31, 2002, based on lack of cooperation by the Charging Party. No appeal was filed to the dismissal of the charge.

The record contains a collective-bargaining agreement executed by the Union on July 11, 2002, and by the Employer on July 23, 2002, effective for the period July 1, 2002, through and including June 30, 2003 (herein the Agreement). This Agreement states:

This Agreement defines the relationship between SEIU 790 and the following FSA bargaining units, which shall be considered individual bargaining units, included in this master agreement:

TAPP
Family Development Center

The Agreement covers approximately 65 employees including about 7 non-professional and 16 professional employees in the TAPP unit. The parties stipulated that the employees in both units voted to ratify this Agreement.

The record reflects that there was no written or expressed understanding between the Employer and the Union regarding whether the execution of the Agreement was intended to settle or resolve the unfair labor practice allegations raised in the charge in Case 20-CA-30725-1. At the hearing, the Employer's principal representative during the negotiations, Attorney Mark Montobbio, and the Union's principal representative, Ruben Garcia, testified regarding the negotiations and the filing of the unfair labor practice charge in Case 20-CA-30725-1. Both representatives agree that twelve or thirteen negotiation meetings took place before agreement was reached. Montobbio and Garcia attended all of the meetings. Both Montobbio and Garcia agreed that there was a meeting held in Montobbio's office in June, 2002, at which virtually all of the terms of the Agreement were finalized.

Union representative Ruben Garcia testified that during "the seven years that it took to get a contract we [filed unfair labor practice charges] at least two or three times." According to Garcia, the charge in Case 20-CA-30725-1 was mentioned briefly during bargaining as a "side conversation," "and then we continued working on the main one, which was to reach an agreement." Specifically, Garcia testified that:

Mr. Montobbio made a joke about the ULP and he said, oh you need that, and then we say, my recollection is we say, you know, we'll do anything to reach an agreement. And I remember it's very clear that I say I've been trying to get a contract with FSA for six years, so we'll do anything to reach an agreement.

Garcia further testified that:

We understood that by reaching that—we filed the ULP because of a refusal to negotiate in good faith. We understood, me and my partner from the union, we understood that by reaching an agreement there will be a settlement of the ULP or it will make the ULP a non-issue.

Montobbio testified that at several points while negotiations were taking place, the Union filed unfair labor practice charges all of which were dismissed. According to Montobbio, the unfair labor practice charge in Case 20-CA-30725-1 was filed "right after the Union and myself were involved in serious negotiations to try to resolve the outstanding issues." Montobbio testified that although he was aware of the charge, he recalled no understanding between the parties that the signing of the Agreement would settle the unfair labor practice charge in Case 20-CA-30725-1.

Analysis. As indicated above, the Union contends that the petition herein should be dismissed because the Agreement should serve as a bar to the petition.

In *Douglas-Randall*, 320 NLRB 431, (1995), the Board held that it would dismiss decertification and other petitions filed subsequent to alleged unfair labor practice conduct where the charges are resolved by a Board settlement agreement in which an employer agrees to recognize and bargain with a union. Thereafter, In *Liberty Fabrics, Inc.*, 327 NLRB 38 (1998), the Board extended *Douglas-Randall* to cases involving a private settlement agreement in circumstances where the parties, in the face of outstanding unfair labor practice charges, reached a new collective-bargaining agreement and included in that agreement, a provision settling the unfair labor practice charges. In *Supershuttle of Orange County, Inc.*, 330 NLRB 1016 (2000), the Board addressed the issue as to whether the principals and policy considerations underlying its decisions in *Douglas Randall* and *Liberty Fabrics* should apply to situations where the parties reached a collective-bargaining agreement intended by them to resolve a pending unfair labor practice charge. In so doing, the Board held that where an unfair labor practice charge is filed prior to the filing of a petition and the negotiation of collective-bargaining agreement is intended by the parties to resolve that charge, the petition must be dismissed. 330 NLRB 1017-1018. This holding rested on the intent of both the Employer and the Union that the negotiation of the agreement would serve to settle the unfair labor practice charge.

In the instant case, the evidence shows that the Union “understood” that reaching a contractual agreement would settle the unfair labor practice charge it filed in Case 20-CA-30725-1 or make it a “non-issue.” However, there is no written documentation to support this understanding. Moreover, the Employer’s representative has testified that it was not his understanding that the Agreement would settle the unfair labor practice charge. While there was no finding that the Union’s unfair labor practice charge lacked merit and no claim that the charges were not bona fide, the evidence establishes that the charge was dismissed by letter dated July 31, 2002, based on the Union’s failure to cooperate in the investigation of the charge.

In the absence of documentary or testimonial evidence showing that the reaching of a contractual agreement was intended by both parties to settle the outstanding unfair labor practice charge, I find that the Board’s decision in *Supershuttle* does not mandate that the decertification petition filed herein must be dismissed. In so finding, I note that the Union’s Agent does not assert that there was a mutual agreement as to this issue. I also note that while the Union’s Agent testified as to his understanding that reaching a contractual agreement would settle the unfair labor practice charge, he did not testify that he conveyed or confirmed this understanding with the

Employer. In these circumstances, I find that the evidence does not establish that there was a mutual understanding between the Employer and the Union that the reaching of contractual agreement would constitute a settlement of the outstanding unfair labor practice charge. Accordingly, I decline to dismiss the petition filed herein.

Nor do I find that the argument raised by the Union that there have been changed circumstances since the petition was filed, namely the negotiation of the Agreement covering the TAPP unit and the inclusion of the TAPP and Family Development Center units under the Agreement, sufficient to warrant the dismissal of the petition. Thus, even under the terms of the Agreement, the two units are treated as separate units and have not been merged. I also note that the petition herein was timely filed and, under the Board's contract bar rules, the execution of a collective-bargaining agreement after it was filed does not serve as a bar to it.

- 6/ The Board has held that the unit in a decertification election must be co-extensive with the certified unit, which in the instant case, as shown above, is a unit including both the professional and non-professional employees of the TAPP program. See *Campbell's Soup Co.*, 111 NLRB 234 (1955). Accordingly, the unit appears as described in the certification of Representative in case 20-RC-17214.

It has been administratively determined that the Petitioner has an adequate showing of interest in the unit found to be appropriate.

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